AN EARLY CONSTITUTIONAL CASE IN MASSACHUSETTS.

IN the appendix to Bancroft's History of the Constitution of the United States (Vol. II., p. 472), he gives an extract from a letter of J. B. Cutting to Thomas Jefferson, then abroad, dated July 11, 1788, mentioning what appears to be the earliest instance in Massachusetts of judicially declaring a law unconstitutional. "I have also enclosed," says Cutting, ". . . the manly proceeding of a Virginia Court of Appeals. Without knowing the particular merits of the cause, I may venture to applaud the integrity of judges who thus fulfil their oaths and their duties. I am proud of such characters. They exalt themselves and their country, while they maintain the principles of the Constitution of Virginia and manifest the unspotted probity of its judiciary department. I hope you will not think me too local or statically envious when I mention that a similar instance has occurred in Massachusetts, where, when the Legislature unintentionally trespassed upon a barrier of the Constitution, the judges of the Supreme Court solemnly determined that the particular statute was unconstitutional. In the very next session there was a formal and unanimous repeal of the law, which, perhaps, was unnecessary."

This passage has excited much interest, and inquiries have been made whether it might not be possible by searching contemporary newspapers, or examining the early statutes and resolves, to get some clue that would guide in exploring our judicial records. A letter recently written by Mr. A. C. Goodell, Jr., the learned editor of the Acts and Resolves of the Province of Massachusetts Bay, throws some light upon the matter. It is so instructive a contribution to the subject that we avail ourselves of the permission of the writer and of his correspondent to print the greater part of the letter.

Mr. Goodell, after stating that when he received his friend's application he had memoranda of four cases only which, in resemblance, seemed to approach Mr. Cutting's description, but that neither of these appeared to tally with it exactly. He promised to look over his lists of repealed and repealing acts between 1780 and

1788, to see if there might not be a case more nearly answering the description. He also offered the use of his lists of Acts to aid in a further examination of the court records, should an exhaustive search be thought desirable. He gave the names of the parties in the first two of the cases referred to as Brattle, Admr. *v.* Hinckley *et al.*, and The Same *v.* Putnam *et al.* (Supreme Judicial Court, Worcester, Sept. term, 1786), and added that further study and comparison of the Acts and Resolves prior to 1788 rather confirmed him in the opinion that although the circumstances did not wholly agree with those stated by Cutting, the judgment in these cases, or one of them, was the foundation of Cutting's statement.[1] He then proceeded as follows: —

"The cases I have first mentioned were actions of debt, originally brought in the Inferior Court of Common Pleas for Worcester County, on bonds executed by the defendants to William Brattle, the plaintiff's intestate (and father), in 1770 and 1771, respectively. The writs bear date Aug. 15, 1785, and the pleadings were substantially the same in both cases. After oyer and setting forth the condition, the defendant, without denying the original obligation, pleaded, in bar, that the intestate, being an inhabitant of Boston, on the 20th of April, 1776, joined with the fleet and army of the King of Great Britain, then warring with the Colonies, and became an absentee, and remained ever after, until his death, within the dominions of and a subject of said king; and that, therefore, the court, in rendering judgment, ought not to compute interest upon the sum mentioned in the bond, between April 19, 1775, and Jan. 20, 1783, in conformity to the Resolve of Nov. 10, 1784,[2] which had been revived and continued by the Resolve of Feb. 7, 1785,[3] and which provided that in such suits brought by absentees, judgment for all interest accruing between the dates aforesaid, that is, during the war, should be suspended until further action of the Legislature.

"To this the plaintiff demurred, and judgment was awarded to the defendant. The plaintiff appealed to the S. J. C. at the next term at Worcester, when he waived his demurrer, and, by way of replication, pleaded *precludi non*, for that William Brattle, the intestate, died at Halifax, Oct. 16, 1776, 'and that his estate descended and vested to [*sic*] Thomas Brattle [the plaintiff], and to Katharine Wendell, his children and heirs, who, at the time of commencing this action, were, and ever since have been, citizens of this Commonwealth, and not aliens nor absentees.'

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1 Other early cases in which the legality of the action of local authorities was contested before the same court were carefully re-examined, but did not appear to turn upon a conflict with the Constitution.

2 Acts and Resolves, (new ed.) 1784, Chap. LXXVII., p. 300.

3 *Ibid.* Chap. XXXVIII., p. 338.

"The appellees (the original defendants) demurred, and, upon issue joined, judgment was recorded as follows: —

"'And after a full hearing of said parties upon said pleas the Court are of opinion that the appellees' plea is insufficient to bar the appellant of the interest during the war; it is therefore considered,' etc. — The actions were brought by John Sprague, Esq., and, for the defendants, Caleb Strong appeared in the former case, and Dwight Foster in the latter.

"The Resolves which the judgment of the court here seems impliedly to have set aside, you observe, hardly came up to Cutting's description, which is of a 'particular statute.' It was this variance that induced me to make further search before referring you to these cases.

"I have said that further examination, in the light of Cutting's letter, confirmed my former surmise. This is chiefly because of the relation of the decision and the repealing Act in point of time; but also because of Cutting's allusion to the 'Constitution.' The only written constitution existing at the time Cutting evidently refers to was that of the Commonwealth; but I cannot recall a case at that early period in which our Legislature had followed the direction, or intimation, rather, of the S. J. C. by repealing, 'in the very next session,' a statute because it conflicted with the fundamental law of the State. I do not believe any such case would have escaped me, since the subject is one which, formerly, I pursued with great care and vigilance; and I feel confident that I could not have forgotten such a case had it ever come to my knowledge. There was, however, another application of the word 'Constitution' then much in vogue, and particularly in reference to the subject of legislation covered by these Resolves. This was the treaty obligations entered into with Great Britain, by the General Congress.

"As early as May, 1783, that far-seeing statesman, Alexander Hamilton, as chairman of a committee appointed to take into consideration and report to Congress what further steps are proper to be taken by them for carrying into effect the stipulations of the Provisional Treaty of Peace with Great Britain, signed at Paris, Nov. 30, 1782, reported a Resolve that 'the several States be required, and they are hereby required,' to remove all obstructions which may interpose in the way of the entire and faithful execution of the 4th and 6th articles of that treaty. By a yea and nay vote this report was referred to a committee, and the subject seems not to have come up again until March 21, 1787, when, upon the report of the Secretary for Foreign Affairs concerning certain correspondence between John Adams, Minister Plenipotentiary to Great Britain, and His British Majesty's Secretary of State, the Congress unanimously passed the well-known resolutions in which they declared, *first*, that the Legislatures of the several States cannot of right pass any Acts for construing, limiting, or impeding the operation of any national treaty; *second*, that all such Acts repugnant to any such treaty ought to be forthwith re-

pealed; and *third*, that it be recommended to the several States to make such repeal rather by describing than by reciting the objectionable Acts, and by declaring their repeal in general terms; and that 'the courts of law and equity,' in all causes cognizable by them wherein such Acts are by their terms operative, shall decide according to the true intent and meaning of the treaty, said Acts to the contrary notwithstanding.

"The passage of these resolutions was followed by the issue of a circular letter to all the States, embodying the resolutions and fully declaring and explaining the principles involved. This letter was approved by a vote of Congress, April 13, 1787, and on the 30th of the same month the Legislature of Massachusetts passed an Act in the very words therein prescribed and recommended to the several Legislatures for adoption. This Act of the General Court, though scarcely 'a formal repeal of the law,' was an effectual repeal of the Resolves of 1784 and 1785, which were passed, professedly, in evasion of the 4th article of the provisional treaty with Great Britain; but the decision of the court in Brattle's cases had preceded the passage of this repealing Act of the State Legislature by more than four months, albeit it is true that that Act was passed, as Cutting says, 'at the very next session,' — it being a special session called by proclamation to elect a successor to Thomas Ivers, State Treasurer, who had died since the last prorogation.

"Cutting's mention of the 'Constitution' may be thus explained: In the circular letter above mentioned occur such passages as the following: —

"'*Our national Constitution* having committed to us [Congress] the management of the national concerns with foreign states and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction by the laws of nations and the faith of treaties remain inviolable.'

. . . . . .

"'When, therefore, a treaty is constitutionally made, ratified, and published by us, it immediately becomes binding on the whole nation, and superadded to the laws of the land, without the intervention of State Legislatures.'

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"'—— By repealing in general terms all acts and clauses repugnant to the treaty the business will be turned over to its proper department, viz., the judicial, and the courts of law will find no difficulty in deciding whether any particular act or clause is, or is not, contrary to the treaty. Besides, when it is considered that the judges in general are men of character and learning, and feel as well as know the obligations of office and the value of reputation, there is no reason to doubt that their conduct and judgments relative to those as well as all other judicial matters will be wise and upright.'[1]

1 Thus this masterly statement anticipated the doctrine laid down in United States

"The precise significance of the decisions in these cases, however, is not apparent on the record, and is rendered still more doubtful by a directly opposite decision at the same term, upon an issue raised by pleadings which fail to show clearly that they differed essentially from Brattle's in the ground of the action or in the nature of the defence. This was an action (likewise of debt, and in which the pleas were similar) brought by the Rev. Dr. Henry Caner, of London, previously rector of King's Chapel, Boston, against Houghton, *et al.*, to recover the principal and interest on a bond given to him by the defendants before the Revolution. Although Caner, unlike Brattle, was among those who were formally expatriated by the Act of 1778–79, chap. 24,[1] he was not excluded from the favor accorded to British creditors by the 4th article of the treaty. The Act for confiscating the goods and estates of absentees[2] applied with equal force to both Caner and Brattle. Nor did the decease of Brattle operate to the advantage of his legal representatives, since the Act of March 2, 1781,[3] applied expressly to 'absentees who have died while under the King of Great Britain,' as well as to 'absentees now living.' If it may be shown or is conceivable that Brattle's children remained here while he was in exile, and it be therefore inferred that the court construed the laws so as to exempt them from the consequences of the confiscation of their parent's estate, that inference is against the rule then recognized, and more recently solemnly declared by the judiciary, that confiscation of personal property operated by force of the act, *ipso facto;*[4] and, moreover, by analogy to the rule followed in other similar categories, it must be assumed that the special relief afforded to the kindred of absentees by § 10 of the Act 1778–79, chap. 49, was a full equivalent of their claims and a substitute for any other form of recognition thereof, legal or equitable. Moreover, if Brattle's administrator relied upon a state of facts justifying a decision the reverse of that given in Caner's case, he certainly did not plead it in his replication, which fails to negative the possibility of the children's having shared their father's exile, and of their continued residence in the king's dominions, as his subjects, through the whole period of the war and until after the treaty of peace.

"Upon the whole, the supposition which seems to me most reasonable is that after the decision in Caner's case, the court, upon further argument and advisement, took the broad ground that they were constitutionally bound; *i. e.*, by the supreme law, as declared by Congress, to disregard the State resolves in conflict with the 4th article of the treaty, and to overrule their former decision, and to award to Brattle's administrator

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v. The Schooner Peggy, 1 Cranch, 103; Ware *v.* Hylton, 3 Dall. 199; Lessee of Gordon *v.* Kerr, 1 Wash. C. C. Rep. 322; Livingston *v.* Van Ingen, Paine's C. C. R. 55, etc.

[1] Province Laws, vol. v. p. 912.

[2] 1778–79, chap. 49, Ibid., p. 968.

[3] 1780, chap. 50, Acts and Resolves of Mass. (new ed.), 1780–81, p. 115.

[4] 4 Dane's Abr. 705.

full interest upon his claims from the date of the original obligations to the date of the judgments.

"This decision was in effect, though not expressly, ratified by the Legislature in the Act of April 30, 1787, — an Act which, we may well agree with Cutting, was 'unnecessary,' especially in view of the declaration of Congress in their circular letter.

"The other earlier cases which I have alluded to as exemplifying the authority of the court to defeat proceedings under a State law which in their judgment conflicts with treaty obligations, or with some principle of international law, were decided by the S. J. C. at the February term in Suffolk, 1782. I confess I have very little confidence that either of these earlier cases can have been intended by Cutting; for, although judgment, which was entered up Feb. 19, 1782, was followed by a repealing Act passed on the 5th of July,[1] — the 'next session' — the clause repealed seems to have no relation whatever to the point decided, and could not have been connected with it except through misapprehension, since it was first contained in an Act passed after the cases were decided.[2]

"Briefly, these suits were brought originally in the Common Pleas in Suffolk; one, against George de France, and the other, against Benet Merlino de St. Pry, by James Thomson, a collector of taxes, to recover taxes assessed to them in the town of Boston under several tax Acts in 1779 and 1780.

"The actions were authorized by chapter 18 of the Acts of 1763–64,[3] an Act passed to enable Samuel Adams to unload the burden of his tax-warrants.[4] Prior to this Act, which was limited in its operation to the town of Boston, collectors were confined to the regular remedy by distress; but by the new statute they had, in certain exigencies, an additional remedy by an action at law. All the conditions requisite for resorting to the new remedy existed in this case, and since, by the tax Acts, the taxes for the State, county, and town were ordered to be assessed upon all the 'inhabitants,' which word, by the same Acts, was defined to mean, 'all male persons from sixteen years old and upwards residing or usually doing business' in the town, the plaintiff declared, in debt, that, in each case, the defendant, 'during the whole of said year [1780] and ever since, hath been an inhabitant of said town of Boston, and ratable to the State, county, and town taxes, and was, by the assessors of said town, duly rated,' etc., — setting forth the several assessments, the demand, etc., in due form. The pleas were alike in both cases.

"Perez Morton, for the defendant, de France, appeared and pleaded *nil debet*, whereupon William Tudor, for the plaintiff, demurred, 'reserving

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1 Acts of 1782, chap. 17.

2 Acts of 1781, chap. 28, passed March 5, 1782.

3 Province Laws, vol. iv. p. 668.

4 See note to the Act of 1769–70, chap. 3, in Province Laws, vol. v. pp. 55–57; also my paper on Adams's Difficulty, in Mass. Hist. Coll. vol. xx. p. 213 *et seq.*

liberty of waiving' the demurrer in the S. J. C., and consenting to any new issue by the defendant. Upon issue joined on this demurrer, the court overruled it and awarded judgment for the defendant, and the plaintiff appealed.

"In the S. J. C. the original defendants, waiving the former issue, pleaded, respectively, that they were born in the city of Bordeaux, in the kingdom of France, under the allegiance of the French king, and each further alleged that he 'hath, from the time of his birth to this day, been and remained a subject of the said king, and hath continued under allegiance to said king of France, and, therefore, is not and cannot be subjected to any taxes, imposition, or duties, other than those which respect real property, by the orders, laws, or directions of the supreme power of any of the United States of America,' — all which he is ready to verify, etc., and prays judgment, etc.

"To this plea first, Tudor, and later, John Lowell, for the appellant, the original plaintiff, demurred. A similar demurrer was made in the action against St. Pry. Both demurrers were overruled, and the defendant's pleas sustained and judgment for costs awarded them.

"I am not a little puzzled in endeavoring to satisfy myself upon what supposed obligation the court based these adjudications. I have not discovered any foundation for them in the treaties between France and the United States, except the reciprocity promised to France for its surrender of the *droit d'aubaine* in the treaty of amity and commerce of 1778; nor do I know of any principle of international law at any time recognized which might be supposed to require such an exemption as the defendants claimed. Yet it appears that, simply on the ground that a French resident of Boston had not renounced fealty to his sovereign, he was held by our Supreme Court to be exempt from taxation of his poll and personal estate.

"It is true that on the fifth of May, 1780, the Legislature of Massachusetts had ratified and formally enacted the provisions of the 13th article of the first treaty of Paris, which had been ratified by Congress two years before;[1] but this was about five months after the enactment of one of the tax Acts under which the collector acted, and some two months after the rates of the defendants had been actually determined, and the warrants therefor given to the collector. If, therefore, the court felt constrained to defer to the provisions of the treaty, it could hardly have been because of the enactment of those provisions by the Legislature so long after the plaintiff's right as a public agent had accrued. It must have been, I think, that the court considered the treaty itself the supreme law operating *proprio vigore* without the intermediate sanction of the State. Yet, even in this view, a still greater difficulty is encountered in endeavoring to discover the incompatibility of the system of taxation here and

[1] Prov. Laws, 1779–80, chap. 47, and note thereto, in vol. V., p. 1370.

the treaty. I find it impossible to detect any such analogy between our public taxes and the continental right of *aubaine* (which was a sequestration to the Crown, by prerogative, of the goods of a deceased alien), as would carry the obligation, under our pledge of reciprocity, to exempt from public taxes French citizens resident here. I am forced to conclude that these decisions of the court were a supererogatory manifestation of good faith or good-will towards our Gallic friend and ally; and the likelihood that such a manifestation would be so agreeable to a friend of Mr. Jefferson as to lead him to mention it in his correspondence is the main reason for my calling your attention to it.

"In any event we must conclude that the treaty, somehow, was the consideration which turned the scales of justice, and that the judges had no doubt of their authority to disregard any statute of the State in conflict therewith. This is one of the earliest, if not the very earliest, of instances of the exercise of a new function conferred upon the judiciary by the Constitution of the Commonwealth, in its separation of the judicial, legislative, and executive powers. Before this great constitutional change the judicial courts had no authority to defeat the expressed will of the Legislature, save, perhaps, in those cases of infringement of the natural laws of morality and liberty which the old lawyers were fond of instancing, but which were generally believed so unlikely to occur as to be practically insupposable.

"I had occasion to discuss this pre-constitutional subordination of the judiciary in some remarks I made at the meeting in May last of the Massachusetts Historical Society,[1] upon Judge Samuel Sewall's refusal of the writ of *habeas corpus* to a prisoner committed by authority of a special Act of the Legislature. The views I advanced were rather earnestly questioned at that meeting. But since then Mr. Senator Hoar, who took part in the debate, has called my attention to a speech by Roger Sherman reprinted in Paul Ford's recent publication of contemporary essays on the Constitution, in which the same opinion is expressed. In a more recent letter, the Senator frankly says: 'I have no doubt [of the correctness of] your statement as to the unlimited power of our Legislature before the Constitution, subject always, as you limit it, to the royal prerogative.'[2]

"However incongruous it may have seemed to the sceptical at the period of the adoption of our State Constitution, and however absurd it may yet appear to the lawyers of Europe, that a tribunal which owes its establishment to, and may be abolished by, the Legislature, should have the power

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[1] Proceedings Mass. Hist. Soc., May, 1893, p. 231.

[2] The absolute supremacy of the Legislature during the Revolution — that is, after formal renunciation of allegiance to the British crown, and before the adoption of the Constitution of the Commonwealth — is recognized by the Supreme Judicial Court in Kilham *v.* Ward *et al.*, 2 Mass. 240, and by Sedgwick, J., in another case there reported in the margin (Gardner *v.* Ward, Jr., *et als.*, ibid., p. 251).

to defeat the Acts of that Legislature, we have practically experienced no difficulty in the operation of the system. Everybody understands that a judge is bound to take notice of the superior obligations of national treaties, and of Acts of Congress within their sphere, as well as of the words of the written Constitutions of his State and nation. In the exercise of his function of applying and enforcing the will of the Legislature, the judge is as much bound to see that the Act is within the scope of legislative authority as he is to apply reasonable rules of interpretation. He has no power to repeal, to be sure, but in the particular case before him he may practically relieve either party; yet, notwithstanding his decision, the law remains intact, to be repealed or insisted upon by the Legislature, or perhaps to be sustained by the same judge on more careful consideration, or confirmed by the preponderance of judicial opinion.

"These last paragraphs are hardly responsive to your letter, but were prompted by the recollection of your recent pamphlet upon judicial powers. I am strongly inclined to the liberal theory of judicial authority. I believe that danger is less to be apprehended from the judges' *defeating* legislation, than from their *making law*. As interpreters of the fundamental law to which they and the Legislature are alike subject, their authority to declare a legislative incongruity is implied in their vocation; and the power and the duty are commensurate. But their province is to *discover*, not to *invent*. They are absolutely forbidden to *make* law by the constitutional provision for the exercise of this function by a totally separate and distinct department, and by the express prohibition of interference by the three coördinate branches of government.

"To return for a moment to Brattle's cases. At the time Cutting wrote to Jefferson, the word 'Constitution,' as we have seen, applied to the national treaties simply because they were a part of the fruits of the new and predominant sovereignty inseparable from a union to which, however imperfect, the several States had united in relinquishing their right to deal as independent political communities with each other and with foreign nations.

"This was followed by the gradual relinquishment of some of their internal autonomy; and where the relinquishment was final, it went to make up the new and national 'Constitution;' which had thus a twofold aspect: first, as the legitimate arbiter and dictator of foreign affairs; and second, as the exclusive controller of certain domestic concerns, the management of which it was evident could be safely and to best advantage entrusted to the general government. This paved the way for a new and more perfect frame of government, to which the old name of *The Constitution* was not only *given*, but by which the name was *assumed*.

"During the colonial and provincial period the same word was used here and in England to designate the political system, and also certain rights and privileges which were claimed to be the natural inheritance of Englishmen; and as you are aware, some striking parallels may be

pointed out in the use of the word in its different senses at widely separated periods.

"While, therefore, I would not positively affirm that the case which Mr. Cutting had in mind was not one in which the court pronounced a law void because contrary to the organic law of the Commonwealth, I should not, on the other hand, conclude that he *did* refer to such a case simply because he declared that, in a certain statute passed before July, 1788, 'the Legislature unintentionally trespassed upon a barrier of the Constitution.' I only say that I am not aware of any such decision implying or declaring an infringement of the State Constitution; and what I have given above lends some support to the surmise that the solemn determination of the court of which he writes was against an Act in conflict with our national obligations."

A. C. Goodell, Jr.